

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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GALLELLI, et al., : **Docket** 08-cv-3372 LDW-ARL
Plaintiff, :
- versus - : U.S. Courthouse
CROWN IMPORTS, LLC, et al., : Central Islip, New York
Defendant : September 28, 2010
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TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE ARLENE R. LINDSAY
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For Plaintiff: **Robert Danzi, Esq.**
Law Offices of Robert F. Danzi
900 Merchants Concourse, Ste 214
Westbury, New York 11590
bob@danzilaw.com

Robert M. Lustberg, Esq.
Lustberg & Ferretti
5 Garrison Road
Glens Falls, New York 12801
rlustberg@verizon.net

**For Defendant,
Grupo Modelo:** **Jefferson Eliot Bell, Esq.**
Gary A. Bornstein, Esq.
Cravath Swaine & Moore
825 Eighth Avenue
New York, New York 10019
jbell@cravath.com
gbornstein@cravath.com

For Barton Brands: **Thomas F. Cerussi, Esq.**
Cerussi & Spring
One North Lexington Avenue
White Plains, New York 10601
tcerrussi@cerussilaw.com

Transcriber: Typing At Your Doorstep
(888) 866-5134; (800) 860-5722 fax

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1 THE COURT: -- on behalf of Mr. Danzi.

2 MR. DANZI: Yes, your Honor.

3 THE COURT: All right. You've reviewed that.

4 Okay.

5 MR. BORNSTEIN: And, your Honor, I sent a
6 response to the letter to the Court yesterday.

7 THE COURT: You did?

8 MR. BORNSTEIN: Yes. Yesterday afternoon, I
9 believe around 3 o'clock.

10 THE COURT: Okay. I don't think I saw that. So
11 just give me a minute. All right. And you say you're
12 working together, relevant facts. What do you have to
13 report? And please identify yourself for the record.

14 MR. BORNSTEIN: Absolutely, your Honor. Gary
15 Bornstein from Cravath.

16 THE COURT: Okay.

17 MR. BORNSTEIN: As I spoke with counsel for
18 plaintiffs this morning, we walked through what it is
19 that I've learned. I'm happy to hear from the Court as
20 well. We spoke immediately after hearing from
21 plaintiff's counsel on Thursday. I called the general
22 counsel of the company and asked her to commission an
23 investigation which she did.

24 And since sending the letter to the Court
25 yesterday, I heard back from her with the results of the

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1 investigation which are as follows. I gave the report to
2 the general counsel asking her to give the report to
3 somebody at the company with knowledge of the relevant --

4 THE COURT: You mean the expert report.

5 MR. BORNSTEIN: Yes.

6 THE COURT: Okay.

7 MR. BORNSTEIN: I gave the expert report to
8 general counsel. I asked her to pass the expert report
9 along to somebody at the company with knowledge of the
10 relevant technical issues in order to get some sense of
11 the report and what's in it and the usefulness of the
12 report. She did that. She gave it a gentleman at the
13 company who is responsible for quality control and things
14 like that.

15 His reaction was to say I know some of this
16 stuff but I really don't know very much about the
17 technical substance of the report which refers to the
18 glass bottle manufacturing issues and glass bottle
19 destruction issues. And he said I don't know enough
20 about this because we don't make glass bottles at Modelo.
21 We buy them from other people.

22 And so he gave the expert report to a contact
23 of his from one of the companies from which Modelo
24 purchases glass bottles.

25 THE COURT: That would be Emhart (ph.)?

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1 MR. BORNSTEIN: No, Emhart is the employer of
2 plaintiff's expert.

3 THE COURT: Okay.

4 MR. BORNSTEIN: What Emhart does is manufacture
5 machines that are used in the production of glass
6 bottles.

7 THE COURT: Okay.

8 MR. BORNSTEIN: And so this gentleman at Modelo
9 passed the report along said, hey could do me a favor,
10 would you please look at this. Let me have your feedback.
11 The general counsel followed up to see who it was who got
12 a copy of the report, personally spoke to people --

13 THE COURT: Was there any limitation on the
14 distribution of the report?

15 MR. BORNSTEIN: Absolutely not.

16 THE COURT: Okay.

17 MR. BORNSTEIN: It's not confidential. The
18 protective order doesn't cover it. There's no
19 confidential information in it.

20 THE COURT: Okay.

21 MR. BORNSTEIN: The general counsel learned
22 from her conversations with relevant people that there's
23 a gentleman at the glass manufacturer named Emilio
24 Sanchez (ph.) who in the course of regular communications
25 with a contact of his at Emhart -- remember Emhart makes

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1 the machines that used in the production of the bottles.
2 Mr. Sanchez works for the company that makes the bottles,
3 not Modelo.

4 THE COURT: Okay.

5 MR. BORNSTEIN: Modelo owns a minority interest
6 in the bottling manufacturer.

7 Mr. Sanchez reports of regular business
8 dealings with the gentleman at Emhart whose name is
9 Carlos Martens.

10 THE COURT: Go ahead.

11 MR. BORNSTEIN: He said to Mr. Martens, "Hey do
12 you know this guy Matt Hyre?" That's the plaintiff's
13 expert. And Mr. Martens said "No, I don't, why do you
14 ask?" Mr. Sanchez said, "Well I saw this expert report
15 he submitted in this case against Modelo and it's really
16 bad. There are a lot of mistakes in this report." And
17 Mr. Martens said, "Well I don't know who he is." End of
18 conversation.

19 The following day Mr. Martens calls back
20 Mr. Sanchez and says "Actually you know what, I found out
21 that this guy Hyre works for us part-time. He does some
22 consulting work on a part-time basis." Mr. Sanchez
23 responded "Okay, well he's apparently not very good
24 because his report has all of these mistakes in it." End
25 of conversation.

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1 THE COURT: That's it?

2 MR. BORNSTEIN: End of issue. That's it. No
3 threats. No discussions about we're not going to do
4 business with you. No discussions about business at all,
5 just a question and answer, and a comment about the
6 quality of the report. That's it.

7 THE COURT: All right. Mr. Danzi, do you have
8 anything more to add to that?

9 MR. DANZI: Yes, your Honor, may it please the
10 Court. My partner, Mr. Bob Lustberg communicated with
11 the attorney for Emhart and in connection with those
12 conversations, he has some relevant things to add to this
13 ^10:51:14 (inaudible) piece and I'LL have him address
14 that issue.

15 THE COURT: Okay.

16 MR. DANZI: Thank you.

17 MR. LUSTBERG: Well first of all, your Honor,
18 the conversation that we had with Emhart's attorney was
19 to the effect that the sales staff had -- from Emhart had
20 been in contact with the purchasing people who dealt with
21 Grupo Modelo.

22 THE COURT: Entirely consistent with what was
23 just reported. What else?

24 MR. LUSTBERG: Exactly. We have -- we also --
25 the question here is whether the contact was made from

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1 the entity -- a Grupo Modelo entity and it was with
2 respect to the Matt Hyre report through his employer.

3 Quite frankly, our expert has told us --

4 THE COURT: Do you have anything more to add
5 factually other than a characterization?

6 MR. LUSTBERG: Your Honor, we do not know that
7 what he has told us is accurate. We have asked Emhart's
8 attorney for the names of the individuals involved. He
9 did not know the names of the individuals involved.

10 THE COURT: All right. End of story. When you
11 have more information, I'll be happy to hear it.

12 MR. LUSTBERG: Well, your Honor, we obviously
13 are going to need an opportunity to subpoena people
14 because --

15 THE COURT: You can go ahead. Use the --
16 whatever vehicle is available to you. I'm not going to
17 sign anything. Grupo Model's not a party to this action
18 at all. I'm not even sure I have any jurisdiction to
19 take any action at all but in any event, go right ahead.
20 Go do what you think you've got to do.

21 MR. LUSTBERG: What we are going to be doing is
22 asking the Court to issue subpoenas.

23 THE COURT: No, I'm not issuing a so-ordered
24 subpoena against Grupo Modelo or anybody who is not a
25 party in this action.

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1 MR. LUSTBERG: Well the problem we have, your
2 Honor, is that we can't speak to these people.

3 THE COURT: Oh, well I don't know what else you
4 want me to do. What do you mean you can't speak to them?

5 MR. LUSTBERG: Well, your Honor, if the
6 attorney for Emhart says he's not going to allow us to
7 talk to the Emhart employees that had been contacted and
8 we know a contact took place. I need some sort of a
9 process to tell them what --

10 THE COURT: I don't know what process that
11 would be.

12 MR. LUSTBERG: Well I --

13 THE COURT: I don't have jurisdiction over
14 those parties.

15 MR. LUSTBERG: Well, your Honor, we think this
16 Court has jurisdiction to grant a remedy in an obvious
17 situation where we have a contact.

18 THE COURT: No, you don't have an obvious
19 situation. You have what has been described as a fairly
20 innocent contact and you have nothing to say to me that
21 proposes a different -- I mean you have nothing, as I see
22 it.

23 MR. LUSTBERG: We have nothing because we do
24 not have the ability to ask these people questions. We
25 have our expert who has told us that he is not going to

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1 even talk to us anymore because of a situation --

2 THE COURT: Well he's the place to start, I
3 would think because ultimately to the extent that you
4 have control over any part of this, you have control over
5 your own expert who I gather you must have paid some
6 money to.

7 MR. LUSTBERG: We paid a lot of money.

8 THE COURT: Okay. So you need to start with
9 him. I mean what does he tell you?

10 MR. LUSTBERG: He is telling --

11 MR. DANZI: May I speak to that, Judge?

12 THE COURT: Sure.

13 MR. DANZI: Because I had the conversation with
14 him.

15 THE COURT: Uh-huh.

16 MR. DANZI: He said that he got a -- "I got a
17 call from Matt on Wednesday, September 22."

18 THE COURT: Matt?

19 MR. DANZI: I'm sorry, Mr. Hyre -- Dr. Hyre.

20 THE COURT: Okay.

21 MR. DANZI: He was leaving the country to go to
22 Rio de Janeiro in September. He said he got a phone call
23 from his employer, his boss and was told that the sales
24 staff was going out selling the Emhart product to a
25 Corona company, was being turned away because of Matt

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1 Hyre's involvement in this lawsuit. And that his -- he's
2 a young man. He's in his early 40s. He's got a wife and
3 a child and that his livelihood is in jeopardy and he's
4 scared. He doesn't know what to do. He flew to --

5 THE COURT: Have him sign an affidavit.

6 MR. DANZI: But my problem is --

7 THE COURT: No, you have no problem getting an
8 affidavit from somebody under your control. I want a
9 sworn affidavit stating facts, not his surmise and not
10 your narration of what he said.

11 MR. DANZI: Your Honor, may I please just make
12 the following statement?

13 THE COURT: Go ahead.

14 MR. DANZI: He has refused to have any further
15 conversation with me because of the pressure that's been
16 on him through his --

17 THE COURT: I can't do anything about it. I
18 have to have facts. I must have from you an affidavit by
19 the person who you say was interfered with. I can't take
20 your version of this. Your verison of this doesn't help
21 me.

22 MR. DANZI: I have no problem with that.

23 THE COURT: Okay.

24 MR. DANZI: And I'm happy to do that.

25 THE COURT: Okay.

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1 MR. DANZI: But I also would like to get some
2 input from the attorney from Emhart who communicated with
3 us to confirm that in point of fact --

4 THE COURT: If they want to submit an
5 affidavit, get one from them as well.

6 MR. DANZI: Do I have any remedy vis-a-vie the
7 federal rules?

8 THE COURT: You want me to do your research for
9 you?

10 MR. DANZI: No, your Honor.

11 THE COURT: You tell me what it is. I don't
12 know.

13 MR. DANZI: Your Honor, I will do that.

14 THE COURT: Okay.

15 MR. DANZI: Thank you very much.

16 THE COURT: All right.

17 MR. DANZI: We will proceed as you direct.

18 THE COURT: You know, do I know how you should
19 proceed? No, I think that you're going to have to figure
20 it out and then if there's a challenge to it, I'll decide
21 whether or not it's in accordance with the law but I'm
22 not going to do your research for you and tell you how to
23 go about this. But I'd certainly -- I think what shouts
24 out here is that there must be affidavits so that we're
25 relying on actual statements of witnesses and not

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1 someone's, you know, narration or interpretation of
2 typical problem, with taking this -- you know, this --
3 taking it from someone whose not being sworn to.

4 MR. DANZI: If I may, and I will end this
5 conversation --

6 THE COURT: Right.

7 MR. DANZI: -- because it's clear that you draw
8 the line (inaudible) direction. We will do that.

9 THE COURT: Go ahead.

10 MR. DANZI: We will reach out to Mr. Hyre and
11 seek to have him sign an affidavit as to what transpired.

12 THE COURT: Right.

13 MR. DANZI: If we are not successful in doing
14 that, I will submit a sworn statement to the Court
15 outlining what it is I attempted to do and then develop a
16 plan -- I ask the Court for the remedies based upon
17 whatever transpired (inaudible).

18 THE COURT: I'm telling you that you could
19 certainly do that and lay out whatever you think I need
20 to take a look at. But in the absence of someone who is
21 prepared to execute a sworn statement as to the fact that
22 pressure was put on him, you're -- it's a house of cards
23 that can't be built.

24 MR. DANZI: We will get that affidavit.

25 THE COURT: Okay.

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1 MR. DANZI: Thank you.

2 THE COURT: All right. I thought as long as
3 you're here, I'm going to take the opportunity to resolve
4 a couple of other issues that have been kind of spinning
5 out there that should have been resolved a while ago. I'm
6 not sure how they came to languish so long but they did.

7 Okay. Starting with the motion to compel the
8 depositions of the five nurses, okay? It seems that the
9 primary objection to the taking of those depositions
10 rests on two basis; that is one, it exceeds the number
11 ten and the other is that the discovery schedule will be
12 exceeded by then.

13 One of the things I intended to do today
14 obviously is to extend the discovery schedule for a whole
15 host of other reasons, much to do with the applications
16 -- other applications made by the parties in this case
17 which makes clear that discovery in this case is not
18 over. So to the extent that the objection is based on
19 the discovery schedule, that one is not going to fly.

20 The question of whether or not the number ten
21 should limit the deposition of these nurses, clearly the
22 deposition of these nurses to the extent that it's
23 believed that they had conversations with the parents or
24 the child, are relevant. I'm not going to limit the
25 defendants from doing that.

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1 And I can't even understand why somebody would
2 not want to have those depositions taken, particularly
3 the plaintiffs because regardless of whether or not
4 they're deposed, they're still going to be witnesses at
5 trial. So you just deny yourself the opportunity to, you
6 know, interview them before trial. Why anybody would
7 want to be in that posture, I'm not sure. But my -- even
8 if I decided that exceeding they number ten will not be
9 permitted, they're not going to be precluded from being
10 trial witnesses. So it seems to me that it would turn
11 out to be a serious disadvantage to the plaintiffs, I
12 suppose by not permitting those depositions and
13 permitting them to partake in them.

14 So those depositions could go forward. They
15 should be done expeditiously and in accordance with the
16 schedule I'm going to set as soon as I'm done with some
17 of these other motions.

18 There is the motion -- actually, it's six
19 nurses, right? Five nurses? Six nurses.

20 MR. BORNSTEIN: I believe there are six,
21 your Honor. We have the attorney here who is
22 representing the nurses, as well.

23 THE COURT: Okay. Does anyone want to add
24 anything to what I've discussed? I mean I suppose that
25 this is a disruption to the hospital but I would be happy

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1 to hear from you on that basis.

2 MR. LOCHMAN: Your Honor, Charles Lochman
3 (ph.). I don't know (inaudible). I've spoken to counsel
4 and suggested that perhaps we could take the deposition
5 of one or two of the nurses first and see whether or not
6 he actually needs to depose all six.

7 THE COURT: Uh-huh.

8 MR. LOCHMAN: And the other question I have and
9 I would like to have your Honor resolve the issue that
10 Nurse Carolli (ph.) violated HIPAA by speaking first to
11 the plaintiff's counsel and then apparently to defense
12 counsel when she heard about how the accident occurred.
13 I'm (inaudible) HIPAA violation, your Honor, I know
14 that's been placed on the record by plaintiff's counsel
15 and we haven't had an opportunity to brief that, your
16 Honor, but it's clear that this was a -- how the accident
17 happened is not protected (inaudible).

18 THE COURT: I tend to agree with you but who --
19 is someone saying that it is? I mean I know that
20 plaintiff's communication suggested a HIPAA violation but
21 you yourself avail -- you spoke to the nurse about this?

22 MR. DANZI: I spoke to the nurse.

23 THE COURT: Okay. And --

24 MR. DANZI: Sorry. The nurse --

25 THE COURT: Did she -- what did she

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1 specifically reveal?

2 MR. DANZI: What she said to me is that the
3 history of it happening, how the accident -- how the
4 injury occurred, which is medical history, that the
5 bottle was dropped on the floor and as a result of that
6 the young man got glass in his eye.

7 THE COURT: You see, you can't blur these
8 lines. You know, you have an accident, a car accident on
9 the -- you know, on the road. The police -- the
10 ambulance driver who responds tells the police they just
11 had a car accident. That's not a HIPAA violation. To
12 report how the accident or how the injury occurs is not a
13 HIPAA violation because that would prevent an ambulance
14 responder from telling a police officer that the accident
15 occurred as a result or the injuries occurred as a result
16 of a motor vehicle accident. That's not the intent of
17 HIPAA.

18 MR. DANZI: May I --

19 THE COURT: What can't happen is the ambulance
20 driver cannot speak to the specific medical problems of
21 the individual. So what did you want to add to that?

22 MR. DANZI: What I wanted to add to that is
23 that based upon the duties and responsibilities of those
24 officers, communication between them in the ordinary
25 course is ordinary and custom and practice and is there

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1 is notice of violation in that setting for the nurse,
2 without any authorization to unilaterally pick up the
3 phone and call me and relay medical history to me --

4 THE COURT: I don't think that matters.

5 MR. DANZI: -- may I finish?

6 THE COURT: I'm not -- go ahead.

7 MR. DANZI: I'm sorry.

8 THE COURT: I got your point. I don't think it
9 matters.

10 MR. DANZI: All right.

11 THE COURT: Could the ambulance worker tell a
12 family member? Yes? No?

13 MR. DANZI: For an infant; yes. But may I just
14 (inaudible).

15 THE COURT: No, I didn't qualify it that way.
16 My 18-year-old son has an accident. I go there. Can the
17 ambulance tell me -- the ambulance driver tell me my son
18 was just in a motor vehicle accident?

19 MR. DANZI: Of course he can.

20 THE COURT: Okay. There we go.

21 MR. DANZI: Of course we can.

22 THE COURT: I just needed you to acknowledge
23 that.

24 MR. DANZI: Yes, of course he can.

25 THE COURT: All right. And that's not a HIPAA

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1 violation.

2 MR. DANZI: Which Judge, communication to you?

3 THE COURT: Yes.

4 MR. DANZI: No, that's not.

5 THE COURT: Okay.

6 MR. DANZI: However, communication is not so
7 clear but there was one more communication that is
8 equally important is that she got on the phone and called
9 the attorney's for Barton and she left a message with
10 Barton with the attorneys for Barton to a similar -- and
11 that's what she told me she was going to do. That is not
12 permitted within the definition of HIPAA, Judge. It's
13 not.

14 THE COURT: And you -- but essentially limited
15 to how the accident occurred.

16 MR. DANZI: If it was --

17 THE COURT: Or what was reported to her.

18 MR. DANZI: I would say that's right.

19 THE COURT: Okay.

20 MR. BORNSTEIN: Your Honor, if I may address
21 that?

22 THE COURT: Yes, go ahead.

23 MR. CERUSSI: Thomas Cerussi for Barton
24 defendants. Your Honor, the initial communication by
25 Nurse Carolli came from a call from her to my client,

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1 either Barton's -- the Barton defendants or Crown Imports
2 customer service line in Chicago. It's an 800 number
3 people leave complaints, messages.

4 And this was after she had -- this was before
5 the litigation. This was before I was even involved.
6 This was after she obviously was treating the child, read
7 about the claims that were going to be pled in this case
8 in Long Island Newsday.

9 THE COURT: I remember reading that.

10 MR. CERUSSI: After her conversations with --

11 THE COURT: Whatever she read, caused her to
12 become sufficiently upset so that she decided to
13 volunteer some information.

14 MR. CERUSSI: Then she spoke with Mr. Danzi. I
15 don't know how that conversation went.

16 THE COURT: Okay.

17 MR. CERUSSI: After that, she left a message on
18 the complaint line, nothing was saved. Her message
19 basically was "My name is Nancy Carolli. I have
20 information regarding this incident. Here's my phone
21 number." They never followed that up. I was given that
22 information once I came into the case.

23 I called her, your Honor, at the end of last
24 year, 2009. She was reluctant to speak with me,
25 specifically because of HIPAA. She said that she had

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1 information which was contrary to what she read in the
2 paper but she would not share that with me. She said
3 that I needed to go through the proper channels of her
4 employer, of HIPAA, in order to get that information.

5 Thereafter, we had served subpoena that were
6 rejected by the hospital because they weren't so ordered.
7 I had one other conversation with her with regard to
8 scheduling the depositions and that was it. There was
9 nothing else discussed. She did not tell me what
10 happened other than the general information that what
11 they're claiming in the case, what she read in the
12 newspaper was not her understanding of how this accident
13 happened. And that was based on her having conversations
14 or eliciting the conversations with the family members at
15 the hospital. And she said that was also true of other
16 hospital personnel.

17 And that's why we subpoenaed the other nurses.
18 There are two doctors who also had entries in the record.
19 We did not subpoena them, your Honor. They are no longer
20 with the hospital. One is up in Westchester. One is in
21 Philadelphia. So that's why --

22 THE COURT: Okay. So number one, what -- with
23 respect to this HIPAA issue, what does it have to do with
24 anything we're doing in this courtroom?

25 MR. DANZI: I think that there are remedied

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1 that are available (inaudible) state court cases and
2 (inaudible),

3 THE COURT: That would do what, preclude her
4 from being called as a witness?

5 MR. DANZI: Yes.

6 THE COURT: Okay. We're not -- I'm not doing
7 that, okay? So what -- you know, I thought that, you
8 know, the remedies under the -- well you might know,
9 counselor, what is the enforcement mechanism for HIPAA
10 violations?

11 MR. LOCHMAN: Well if there's a violation,
12 Judge, there's an agency that sanction the person that
13 violated a privileged communication. And that's actually
14 been (inaudible), if you will, by plaintiff's letter to
15 the Court that my client is in violation of federal law
16 by making the phone calls that were placed on the record.
17 And as your Honor has indicated, there has been no
18 discussion of privileged health information. It's how an
19 accident happened. What they learned about how the
20 accident happened.

21 THE COURT: I'm fairly confident that how an
22 accident happened is not covered by HIPAA. However, I
23 haven't looked. I must confess that the HIPAA law isn't,
24 you know, at the top of my, you know, top ten list of the
25 areas of law that I'm familiar with, so --

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1 MR. LOCHMAN: Well I would respectfully request
2 that if counsel intends to raise this issue before a
3 deposition of Nurse Carolli --

4 THE COURT: It won't matter. I'm going to
5 issue a so-ordered subpoena for her that permits her to
6 testify. If she committed a HIPAA violation prior to
7 giving a deposition, well that's a separate matter. I'm
8 not going to bar her testimony forever more because of
9 what has been described here in this courtroom which is
10 sort of what I think Mr. Danzi you're asking me to do.

11 MR. DANZI: I am.

12 THE COURT: Okay. Well that's not going to
13 happen.

14 MR. DANZI: I asked.

15 THE COURT: Okay. You asked. Okay.

16 MR. BORNSTEIN: Can I just make one other
17 point?

18 THE COURT: Yes.

19 MR. BORNSTEIN: At the heart of my objection to
20 these (inaudible) is the failure of attribution.

21 THE COURT: Is the what?

22 MR. BORNSTEIN: The failure of attribution. In
23 other words, there isn't any reasonable basis based upon
24 their (inaudible) in the chart, that they had any
25 communication. As a matter of fact, based upon the pages

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1 in the chart that were attached to Mr. Cerussi's request
2 here, those entries did not -- were not by the nurses in
3 question. Those entries were by doctors and were both
4 other people who overheard or recorded varying history.
5 There isn't a good faith basis to bringing these nurses
6 into this process to have them be asked questions because
7 in point of fact, there's no indication from their own
8 entries by -- in their own hand that they were given any
9 information by the --

10 THE COURT: So why are you objecting to them
11 wasting their time?

12 MR. BORNSTEIN: I guess because I'm objecting
13 to wasting my time.

14 THE COURT: Okay. Then don't even attend the
15 deposition if you think it's going to be that totally
16 useless.

17 MR. BORNSTEIN: I suspect I probably won't be
18 there.

19 THE COURT: Okay. All right. So I mean
20 ultimately saying to me that the other side is wasting
21 their time taking the deposition is not a basis for me
22 barring the deposition. Do you understand that?

23 MR. BORNSTEIN: Oh, I do but I do --

24 THE COURT: All right.

25 MR. BORNSTEIN: But I did have to make the

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1 point. I could not sit passively and allow these
2 depositions to occur without making an attempt to prevent
3 them from happening.

4 THE COURT: I get it. So if they're wasting
5 their time, so be it. Hopefully they'll work it out. If
6 they take two depositions at first and they realize
7 they're chasing rabbits, maybe they won't require all six
8 nurses to appear, recognizing that nurse time is valuable
9 time and shouldn't be taken lightly.

10 MR. BORNSTEIN: As (inaudible) this morning, we
11 will follow the Court's (inaudible).

12 MR. DANZI: Your Honor, if I may, can we submit
13 a subpoena to order to be so-ordered?

14 THE COURT: Yes, do that because you're not
15 going to get those depositions without them. All right.

16 Now let me just go to these 30(b)(6) witnesses.
17 What's the problem with the 30(b)(6) witnesses? I get
18 that Mr. Testas (ph.) and Mr. Contreras (ph.) have been
19 designated by the defendants as the 30(b)(6) witnesses
20 that can best respond to the areas defined by plaintiff.
21 And I also understand that the plaintiff would prefer
22 somebody else but it really is the defendant's choice.
23 If the persons they designate to respond to the 30(b)(6)
24 witness subpoena don't measure up, then you can come back
25 to me and say they didn't do what we wanted or couldn't

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1 answer the questions that we posed, in which case we'll
2 have to address it again but you don't have the right at
3 this juncture to say they're unsatisfactory.

4 MR. DANZI: Well except that we did have the
5 correspondence from counsel telling us that these people
6 were not testifying based on personal knowledge. And so
7 you know providing us with witnesses (inaudible).

8 THE COURT: Well that's not necessary for a
9 30(b)(6) witness.

10 MR. DANZI: I understand, your Honor. We are
11 trying to deal with an entity that has no employees,
12 none, no bank accounts, no nothing. The only person who
13 has any knowledge with respect to the acts of the company
14 is the person who (inaudible). Apparently he is the sole
15 director of the corporation. That's who we've asked to
16 be produced. It's pretty straightforward, your Honor.
17 Nobody else has any information. There's no employees.
18 They don't (inaudible). That's the (inaudible).

19 THE COURT: But how does -- that's -- how is
20 that your 30(b)(6) witness issue?

21 MR. DANZI: Your Honor, we think that we --
22 obviously you've stated your position that you don't
23 think that when they come forward and say we're going to
24 produce these witnesses who have no personal knowledge
25 about anything that transpired, that those witnesses be

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1 taken (inaudible).

2 THE COURT: Okay. But you could see that the
3 defendants get to choose the 30(b)(6) witness; correct?

4 MR. DANZI: Agreed.

5 THE COURT: And do you also agree that a
6 30(b)(6) witness doesn't have to have personal knowledge
7 of everything they testify to.

8 MR. DANZI: Your Honor, I would think that we
9 would be entitled to the testimony of the only person in
10 that corporation (inaudible), as well as anybody else
11 they want to (inaudible).

12 THE COURT: Well you may be able to
13 independently subpoena that person but you can't decide
14 who the defendants designate as a 30(b)(6) witness.
15 That's the rule, okay?

16 MR. DANZI: I understand that.

17 THE COURT: All right. What about the motion
18 to compel 911 tapes? Now I take it that Suffolk County
19 has preserved the tapes?

20 MR. BELL: Good morning, your Honor.

21 THE COURT: Yes.

22 MR. BELL: Jeff Bell from Cravath. Yes, they
23 have. They have located the tapes and they are willing
24 to provide them to us.

25 THE COURT: Okay. And so what's the problem

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1 with getting the tapes other than the discovery schedule?

2 MR. BELL: I understand that there are no
3 problems other than the objections raised by plaintiffs
4 and the police department's needed to have a so-ordered
5 subpoena to comply with their procedural orders.

6 THE COURT: All right. Submit the so-ordered
7 subpoena.

8 MR. BELL: Thank you, your Honor.

9 THE COURT: Okay. Now we have the motion to
10 compel documents from Extrade or Extrade. Is that how
11 you pronounce it?

12 MR. BORNSTEIN: Extrade, your Honor.

13 THE COURT: Extrade.

14 MR. BORNSTEIN: I'm sure it's actually
15 something else in Spanish but we always call it Extrade.

16 THE COURT: Okay. All right. So let's go over
17 those issues. Let's see, it's page -- it's the
18 submission of August 16; right? Is that this one? All
19 right. What about the advertising materials?

20 MR. BORNSTEIN: Your Honor, Gary Bornstein
21 again.

22 THE COURT: Uh-huh.

23 MR. BORNSTEIN: The advertising materials were
24 requested of Extrade. They were also requested of Mr.
25 Cerussi and Brandman's clients, Crown and Barton, who

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1 produced them. Crown is the one responsible for doing
2 the advertising. Crown was asked to turn over the
3 information. Crown turned it over.

4 My client is not responsible for doing the
5 advertising and plaintiffs have the documents they asked
6 for. So I'm not sure what the problem is.

7 THE COURT: Is there anything more that Extrade
8 has other than what Crown has produced?

9 MR. BORNSTEIN: No, your Honor.

10 THE COURT: Any problem here?

11 MR. DANZI: Well no, that's the first time we
12 heard that (inaudible) nothing more. So our motion was
13 (inaudible) the case will proceed if, in fact, we
14 received everything from the other side and that's
15 basically what this was all about.

16 THE COURT: All right. And then just in
17 writing respond that way.

18 MR. BORNSTEIN: I have and I'll do it again,
19 your Honor.

20 THE COURT: Okay. Incident reports?

21 MR. BORNSTEIN: The incident reports, your
22 Honor, Extrade doesn't have incident reports.
23 Nevertheless we went and dug up incident reports from
24 affiliate companies. The incident reports that we have
25 are all in the nature of communications to counsel,

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1 insurance company counsel and they are therefore
2 privileged.

3 THE COURT: Is that laid out in the privilege
4 log?

5 MR. BORNSTEIN: It is. We provided the log.
6 Plaintiffs asked us for the identity of the individuals
7 on the log and the affiliations. We provided them, as
8 well.

9 THE COURT: Okay.

10 MR. BORNSTEIN: So again I'm not sure what the
11 issue is.

12 THE COURT: Well the issue is that they claim
13 and I don't want to speak for the plaintiffs but it
14 appears that whatever you submitted didn't really clearly
15 identify the relationship of the entities on the log; is
16 that so?

17 MR. BORNSTEIN: Yes, your Honor. The request
18 -- excuse me the letter that was provided to plaintiff's
19 counsel and which plaintiff's counsel cites in which we
20 supposedly refused to provide the information as to the
21 individuals, and said they were self-evident is Exhibit H
22 to our submission of August 16.

23 It's -- we do, in fact, say that we believe --
24 this is Mr. Bell next to me that sends the email --

25 THE COURT: Wait, let me get to Exhibit H.

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1 MR. BORNSTEIN: Thank you.

2 THE COURT: Exhibit H of your submission of --

3 MR. BORNSTEIN: Of August 16, your Honor.

4 THE COURT: August 16.

5 MR. BORNSTEIN: It's an email dated July 12
6 from Mr. Bell. I have a copy I can provide the Court if
7 you need it.

8 THE COURT: I have your submission of August 16
9 but I don't see it tabbed with an Exhibit H. Maybe
10 it's --

11 MR. BORNSTEIN: It's buried near the back,
12 your Honor. It's the second to last exhibit. It's a
13 July 12 email to Mr. Bell.

14 THE COURT: No, I don't think I -- at least I
15 haven't found it. Well this is July -- this is August 16
16 but I'm not finding the document. If you have another
17 coy, why don't you just hand it up.

18 MR. BORNSTEIN: Absolutely, your Honor. I
19 apologize for the --

20 THE COURT: Is see there are several emails but
21 I'm not sure I'm finding the right one. What did you --
22 which date was the email?

23 MR. BORNSTEIN: July 12, your Honor.

24 THE COURT: July 9.

25 MR. BORNSTEIN: From Jeffersn Bell.

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1 THE COURT: All right. It's probably in here
2 somewhere but it's not tabbed, so it's not helpful.

3 Okay. All right. Go ahead. Now describe this.

4 MR. BORNSTEIN: In the -- this was an email
5 that responded to a number of issues the plaintiffs
6 raised. The relevant one here is the paragraph that
7 begins with --

8 THE COURT: Bob is whom?

9 MR. BORNSTEIN: Bob is Mr. Lustberg.

10 THE COURT: Okay.

11 MR. BORNSTEIN: The relevant paragraph here is
12 the one that begins with the word second.

13 THE COURT: Uh-huh.

14 MR. BORNSTEIN: Mr. Bell reports that some of
15 the entries on the log do not have addressee information
16 because the documents don't have addresses, they're
17 memos. More importantly, with respect to the
18 relationships with parties, Mr. Bell does say that this
19 should be self-evidence. He then goes on, however, to
20 give the relevant information. He identifies each of the
21 individuals with whom they're affiliated, and how the
22 various entities are related to one another.

23 THE COURT: All right. Well, Mr. Lustberg, why
24 don't you show me what you say is an example of what's
25 unclear.

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1 MR. LUSTBERG: Well first of all, your Honor,
2 you know, we went through this process of the initial
3 with Grupo Modelo. And Grupo Modelo we were told is a
4 solely separate company and therefore, they're not a
5 party and Judge Spatt obviously ruled that they're out of
6 the --

7 THE COURT: I thought it was Judge Wexler.

8 MR. LUSTBERG: Excuse me, Judge Wexler. And so
9 here we are, we now have another defendant in the case
10 and this is a separate corporation. And I don't see that
11 the communication between one corporation to another
12 corporation is necessarily privileged. It's not
13 privileged. This is not a expert communication that was
14 made by (inaudible). It was a communication of a
15 different corporation. I don't see that it's privileged.
16 There's loss of privilege. It's not the defendant. It's
17 not the (inaudible) --

18 THE COURT: Oh, so you know who the -- so it's
19 misleading to say you don't understand the relationship -
20 - you do know the relationship.

21 MR. LUSTBERG: Oh, we know that they're an
22 affiliated company. They've got dozens of companies.

23 THE COURT: And you know that the party to whom
24 the communication was made or from whom the communication
25 was were attorneys?

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1 MR. LUSTBERG: No.

2

3 THE COURT: You don't know that?

4 MR. LUSTBERG: I don't necessarily know that
5 based on (inaudible).

6 THE COURT: Well give me an example of what you
7 say is unclear. I -- just as I was providing an example
8 by the defendants, point to something that helps me
9 figure out what it is you're complaining about.

10 MR. LUSTBERG: To be honest, your Honor, I was
11 not prepared to argue this motion today and I did not
12 bring those papers with me. So it seemed like
13 (inaudible).

14 THE COURT: Well I have copies. Do you know
15 where you need to look?

16 MR. LUSTBERG: No, I would have to take a look
17 at what is the basis -- and I would just look at
18 Jefferson Bell's letter. I mean the fact of the matter
19 is that I don't see how they make an argument that
20 there's any privilege between an attorney for one of the
21 Grupo Modelo companies and Extrade to which was a
22 defendant in this case. I don't see how is there -- they
23 are separate entities. That's what we've been told.

24 THE COURT: But if you could just point to a
25 specific example, maybe it's obvious from the example

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1 what the answer might be.

2 MR. LUSTBERG: Well let me pull up the
3 document, Judge.

4 THE COURT: Okay. Go ahead. I have time. I
5 allotted time for this.

6 MR. BORNSTEIN: And your Honor if it would be
7 helpful, I could hand the Court a copy of the relevant
8 privilege log.

9 THE COURT: Okay. I would be happy to see
10 whatever you want. Now let's take a ten minute break,
11 give Mr. Lustberg enough time to find what it is he says
12 supports his argument and I'll take a copy of that,
13 provide one to Mr. Lustberg.

14 (The Court recessed.)

15 THE COURT: All right. Mr. Lustberg, did you
16 have enough time?

17 MR. LUSTBERG: Yes, your Honor.

18 THE COURT: Okay.

19 MR. LUSTBERG: Your Honor, the issue is that
20 I'm going over this privilege log and the actions that
21 Extrade apparently has in their possession all of these
22 documents and Extrade II is not a defendant in any of
23 these cases. They have those documents in their
24 possession. There is no attorney/client privilege with
25 respect to those documents. They were not a party to any

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1 of these actions.

2 THE COURT: Well I don't think attorney/client
3 privilege depends on whether or not they're a party.
4 That seems to be your argument.

5 MR. LUSTBERG: No, if Extrade -- yes, if
6 Extrade II is in possession of my files, of my attorney's
7 letters through somebody else, that does not give me --

8 THE COURT: Why don't you just give me the --

9 MR. LUSTBERG: -- that's not privileged at all.

10 THE COURT: Don't give me theoretical.

11 MR. LUSTBERG: Okay.

12 THE COURT: What is the specific example you're
13 trying to --

14 MR. LUSTBERG: Sure.

15 THE COURT: That's why I asked you to be
16 specific.

17 MR. LUSTBERG: Yes. No, no. For example --
18 for example, Mark Glazer (ph.) is the author of number
19 one, memorandum number one.

20 THE COURT: Okay. Do I have that? Let me see.
21 Where was that document. What are you looking at? I
22 didn't --

23 MR. LUSTBERG: The privilege log.

24 THE COURT: I don't have a copy.

25 THE CLERK: I thought I put it on. I'll check.

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1 THE COURT: Okay. Is this it?

2 MR. LUSTBERG: I have another copy.

3 THE COURT: Okay. I have it. I have it. Go
4 ahead. All right. So item one, go ahead.

5 MR. LUSTBERG: Item one, Mark Glazer is the
6 author of this document. He neither works for nor has
7 any relationship with Extrade II. The case that he's
8 reporting on is not an Extrade II case. So I don't
9 understand how if Extrade II has this document in its
10 possession, it becomes an attorney/client privilege with
11 respect to Extrade II.

12 THE COURT: Okay. But did you ask that
13 question of counsel?

14 MR. LUSTBERG: We know it. I mean, we know it.
15 We know this case. We know most of these cases --

16 THE COURT: Okay. But did you say to counsel
17 -- you see you're required to meet and confer about an
18 issue before you come to me. Did you go to counsel and
19 say listen, how does this get on the privilege log if
20 Extrade is not a party or just the precise argument you
21 made?

22 MR. LUSTBERG: Well I don't know exactly what
23 the communication was to counsel, your Honor.

24 THE COURT: Well I thought --

25 MR. LUSTBERG: I mean a number of -- I'm going

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1 to say this in all seriousness, I mean, we had a number
2 of emails going back and forth to Mr. Bell and myself
3 concerning this and, you know, obviously they've not be
4 presented to the Court.

5 THE COURT: Okay. So --

6 MR. LUSTBERG: And I want to go through that --
7 between -- and I've looked at these and every single one
8 of these instances has identified Extrade II is not a
9 party. The attorneys referred to is not the attorney
10 from Extrade II. And so if it is Extrade II's
11 possession, how does it become privileged? It doesn't.
12 The only thing that could possibly be privileged is if it
13 was a communication from Extrade to its counsel to or
14 from them concerning the lawsuit providing or giving them
15 advice. And that does not exist here.

16 THE COURT: So you define attorney/client
17 privilege as being limited to situations where somebody's
18 a party to a lawsuit?

19 MR. LUSTBERG: They have to be the attorney --

20 THE COURT: I gather that Glazer is an
21 attorney.

22 MR. LUSTBERG: Mr. Glazer is not Extrade II's
23 attorney.

24 THE COURT: And you confirmed that in
25 conversation with counsel?

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1 MR. LUSTBERG: Well counsel's here. I mean he
2 represents --

3 THE COURT: No, no, no. You see this is what
4 you're required to do. You are required when you have a
5 question like that or you don't understand a response
6 you've been given, to first call your adversary and find
7 out are you correct about your assumption that there is
8 no connection between the two.

9 MR. LUSTBERG: Well --

10 THE COURT: And give them -- and if they give
11 you a bogus answer and one you're not satisfied with,
12 then you come to me.

13 MR. LUSTBERG: Right.

14 THE COURT: But you don't come to me and bypass
15 that inquiry.

16 MR. LUSTBERG: I am -- you know what we did was
17 in good faith was we've looked up these cases. We know
18 these firms.

19 THE COURT: Okay.

20 MR. LUSTBERG: And so we've looked up these
21 cases. We know what these cases are generally about, who
22 the parties were. Extrade II is not a party to
23 (inaudible).

24 THE COURT: I hope I don't get a very simple
25 explanation from the defendants because then I'm going to

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1 be a little annoyed because then it would just mean I'm
2 here going over this and --

3 MR. LUSTBERG: Your Honor?

4 THE COURT: -- it was only because nobody
5 bothered to ask.

6 MR. LUSTBERG: I appreciate that, your Honor.

7 THE COURT: Okay.

8 MR. LUSTBERG: I made that -- just we made the
9 assumption because Extrade II in point of fact was not in
10 existence when some of these lawsuits were (inaudible).

11 THE COURT: All right. You know for the future
12 how I want you to proceed.

13 MR. LUSTBERG: Yes.

14 THE COURT: Okay. All right. But there may
15 not be an answer. So let me hear from the defendant.
16 Who is going to address that?

17 MR. BORNSTEIN: I'll address that, your Honor.
18 Gary Bornstein.

19 Mr. Glazer, let's take this specific example as
20 reflected in the log, is an attorney from the firm of
21 Glazer & Binder as reflected in the exhibit that I
22 directed your Honor to earlier, Exhibit H in our letter.
23 It states that Mr. Glazer is an attorney who works with
24 various affiliate companies of Grupo Modelo. Extrade II
25 is, as Mr. Lustberg just acknowledge, one of the

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1 affiliated companies associated with Grupo Modelo. The
2 privilege here is pursuant to the common interest
3 exception which applies to affiliated companies, pursuant
4 to common enterprise. We've cited some of the cases to
5 your Honor in my August 16 submission, as the basis for
6 the assertion of privilege.

7 THE COURT: So essentially Mark Glazer works
8 for or does work for Grupo Modelo and Extrade is an
9 affiliate of Grupo Modelo's.

10 MR. BORNSTEIN: Correct.

11 THE COURT: Okay. Now -- okay. I have a lot
12 of papers and I tend to lose papers. So where is the
13 April 20 memorandum, just so I -- that's this one. All
14 right. Now I have an email dated July 12. What I want
15 to see if you have it handy is the April 20 memorandum.

16 MR. BORNSTEIN: The April 20 memorandum, your
17 Honor, is the privileged document.

18 THE COURT: I understand that. Do you have
19 that?

20 MR. BORNSTEIN: I did not bring a copy of the
21 document with me.

22 THE COURT: So what I want to do then is have
23 you submit for my review those documents you withheld on
24 that -- on the basis of common interest privilege, okay?
25 I want to examine them. I presume that to the extent

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1 that at least Mark Glazer -- what about Daniel Martinez,
2 the same argument?

3 MR. BORNSTEIN: Same.

4 THE COURT: Okay. Wherever you assert the
5 common interest privilege, submit those documents.

6 MR. BORNSTEIN: I will, your Honor.

7 THE COURT: Okay.

8 MR. LUSTBERG: Can I make my -- go a little
9 further with this because I understand what counsel is
10 saying with respect to the common interest documents.

11 THE COURT: Uh-huh.

12 MR. LUSTBERG: And he's taking the position
13 that these are all affiliated companies and I understand
14 that they in fact are affiliated companies, but, you
15 know, when we asked for document demands, we do not get
16 documents from all affiliated companies. It seems to be
17 very much a one-way street as we understand it that
18 counsel's going to represent to the Court that they were
19 -- these documents were not in Extrade II's hand.

20 So to the extent that we're able to get
21 affiliated companies, we get them but -- so I just want
22 to understand this. The Court's understanding is that we
23 have an affiliated company and --

24 THE COURT: I have no understanding.

25 MR. LUSTBERG: Okay.

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1 THE COURT: Don't ask for my understanding.
2 Ask for their understanding. You're asking me to filter
3 their understanding?

4 MR. LUSTBERG: Well --

5 THE COURT: I think that's what you're asking
6 me to to do.

7 MR. LUSTBERG: No -- okay. No, I guess what I
8 am going to come back is as I'm going to be making a
9 further inquiry by letter to Mr. Bornstein as to whether
10 his responses to our discovery demands are from the
11 affiliated companies, as well, because if he's asserting
12 privilege on behalf of the affiliated company, then he
13 should be producing documents from the affiliated
14 company, as well.

15 THE COURT: Do you want to address that?

16 MR. BORNSTEIN: Can I just forestall the letter
17 and save everyone some time? We've already said in the
18 submission to the Court of August 16, we've produced
19 documents from affiliate companies on behalf of
20 (inaudible).

21 THE COURT: All right. There's your answer.
22 You've been getting the affiliate documents and you don't
23 even know it.

24 MR. LUSTBERG: No, I think I've been getting
25 selective affiliate documents (inaudible).

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1 THE COURT: All right. Okay. I need to see
2 the documents before I can decide that issue. I think
3 that's it.

4 MR. DANZI: Your Honor?

5 THE COURT: Yes.

6 MR. DANZI: With the Court's indulgence and I
7 do understand past position, but given the gravity of
8 this issue which brings us here, would you indulge me
9 about two minutes to (inaudible).

10 THE COURT: Go ahead, make your record.

11 MR. DANZI: Thank you, ma'am. I am now in
12 front of you after almost three years of litigation and
13 tens of thousands of dollars of expenses and the report
14 generated by a PHD from MIT who is a specialist in bottle
15 manufacturing, over twenty pages including all kinds of
16 computational analysis and a million data points, I'm
17 past the point of getting an additional expert as the
18 schedule currently exists and I know that can be easily
19 erected, but the practical respect to this, the practical
20 respect to this is I have an expert, a young guy I've
21 been working with intimately for three years. He comes
22 to me panicked. He's gone.

23 THE COURT: Where is he?

24 MR. DANZI: He is in Minnesota teaching at
25 Northwest --

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1 THE COURT: You give me a subpoena and I'll so
2 order it for him.

3 MR. DANZI: Thank you, Judge.

4 THE COURT: I'll be happy to do that.

5 MR. DANZI: That would be great.

6 THE COURT: What else do you want, Mr.
7 Lustberg?

8 MR. LUSTBERG: Well the other thing I wanted
9 was one of the issues that we had with respect to Extrade
10 II was the location of depositions.

11 THE COURT: Oh, right. On the 30(b)(6)
12 witnesses, I'm thinking that the telephone, videotape
13 arrangement is more than adequate. I mean if they --
14 unless they are witnesses that you know come into the
15 states on any kind of a regular basis or are going to be
16 in the states and I expect the defendants are going to be
17 up front about that, you do this by telephone.

18 If they were, you know, like the eyewitnesses
19 to the event then I would probably take a different tact
20 but because nuance and, you know, eye contact is
21 important when it's the key witness. But I think when
22 it's policy and procedure witnesses, you can do that by
23 telephone and videotape. So make those arrangements.

24 MR. LUSTBERG: Okay.

25 THE COURT: Okay.

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1 MR. DANZI: One quick question?

2 THE COURT: Yes.

3 MR. DANZI: In terms of the subpoena, Judge,
4 where do you want it returnable?

5 THE COURT: To here, I suppose.

6 MR. DANZI: Okay. Because he is in Minnesota.

7 THE COURT: And I get it. We'll do it. We can
8 -- you could do it -- have it returnable but we could
9 take a telephone conference first so I can talk to this
10 gentleman and tell him he's going to be expected to
11 appear at the trial when it's time for the trial. How do
12 you want me to proceed?

13 MR. DANZI: What I would like --

14 THE COURT: You look disappointed by that
15 offer.

16 MR. DANZI: Well because I can't have this
17 process remain unresolved.

18 THE COURT: Oh, it's not going to be
19 unresolved. It's going to be made very clear to this
20 gentleman that he's going to be subpoenaed to appear at
21 this trial.

22 MR. DANZI: I would be much more interested in
23 having him be subpoenaed for the purposes of getting
24 information from him about the contacts that were talked
25 about from him to me.

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1 THE COURT: Okay.

2 MR. DANZI: Because I can't have as a practical
3 matter a witness -- an expert witness I'm at odds with on
4 that witness stand. That won't work. But I really
5 believe that there -- this is not --

6 THE COURT: All right. I'm going to set a
7 hearing date.

8 MR. DANZI: Perfect.

9 THE COURT: Okay.

10 MR. DANZI: Thank you.

11 THE COURT: I'd be happy to accommodate you
12 that way.

13 MR. DANZI: Thank you very much.

14 THE COURT: We'll set a date for a hearing. Go
15 ahead.

16 MR. BORNSTEIN: Two questions, your Honor.

17 THE COURT: Uh-huh.

18 MR. BORNSTEIN: First I wanted to understand
19 the nature of the hearing that Mr. Danzi is requesting.

20 THE COURT: To conduct -- to give counsel an
21 opportunity to present testimony with respect to what he
22 says the interference with his witness.

23 MR. DANZI: Thank you, Judge.

24 MR. BORNSTEIN: And --

25 THE COURT: Okay? And to the extent that he's

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1 having difficulty producing the key witness that the
2 Court needs to hear from who would provide testimony with
3 regard to that matter, I'm going to give him a so ordered
4 subpoena.

5 MR. BORNSTEIN: Okay.

6 THE COURT: Okay.

7 MR. BORNSTEIN: With respect who the key
8 witnesses are on this issue, with respect, I don't think
9 it's the expert. The expert is relaying something which
10 occurred from other people.

11 THE COURT: Well it may be you're right. I
12 don't know but to the extent that I've heard about what
13 occurred, it may be that the expert only has hearsay to
14 offer and not direct knowledge in which case nothing's
15 going to happen.

16 MR. BORNSTEIN: One of --

17 THE COURT: Nonetheless, I think he's an
18 important person to hear from one.

19 MR. BORNSTEIN: One other procedural point, it
20 sounds to me and I hadn't heard this before like there's
21 some prospect that Mr. Danzi may wish not to call the
22 expert at trial. I have a responsive expert report
23 that's due on Monday.

24 THE COURT: Uh-huh.

25 MR. BORNSTEIN: I'm concerned about the

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1 prospect of my producing a report in response to the
2 report of a witness who then isn't going to testify. So
3 if there's some issue about whehter or not Mr. Hyre is
4 going to take the stand, I would request --

5 THE COURT: Well let me ask you, Mr. Danzi, you
6 know, what's going to happen? Are you going to call him
7 or you're not going to call him?

8 MR. DANZI: Well, Judge, how would I know? My
9 point is just --

10 THE COURT: Well, no, no, no. That's -- we're
11 not asking -- I'm not asking you whether he's going to
12 come. Are you going to call him?

13 MR. DANZI: At this point, yes.

14 THE COURT: Okay.

15 MR. DANZI: And --

16 THE COURT: That's your intent?

17 MR. DANZI: That's my prayer.

18 THE COURT: Okay.

19 MR. BORNSTEIN: And we have a deposition which
20 will need to happen too, I assume he'll be made available
21 for that.

22 THE COURT: Is there no reason why you can't do
23 the deposition the day -- as soon as that hearing's over.

24 MR. BORNSTEIN: That's fine.

25 THE COURT: Start it that day.

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1 MR. BORNSTEIN: Okay.

2 THE COURT: All right. So let's agree on what
3 date.

4 MR. DANZI: There's one other issue and that is
5 we know that Mr. Hyre has information that was related to
6 him by the sales staff coming out of Emhart, many of
7 those people are located in Connecticut. After he gives
8 us the information he has, there may be more sources of
9 information that we may wish to pursue and that may --
10 and with the Court's permission, of course, and I'm not
11 suggesting anything other than that, but keep open this
12 possibility of being able to issue subpoenas with regard
13 to the --

14 THE COURT: I should keep it open?

15 MR. DANZI: No, ma'am, I would like to keep it
16 open.

17 THE COURT: Okay.

18 MR. DANZI: No, no. I'm not presupposing
19 anything like that.

20 THE COURT: All right.

21 MR. DANZI: I'm sorry. I misspoke. I would
22 like the Court to understand that we wish to keep open
23 that possibility dependent upon the testimony of Mr. Hyre
24 because as I understand it now --

25 THE COURT: Look, here's -- I'm going to gibe

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1 you this fair warning.

2 MR. DANZI: Yes, Judge.

3 THE COURT: Don't start with your weakest
4 witness because if you start with a weak witness who is
5 not going to demonstrate that any interference occurred,
6 then I'm not going further. I'm not going to give you
7 five subpoenas to chase the rabbit.

8 MR. DANZI: Yes.

9 THE COURT: I am going to let you start with a
10 strong witness who is going to demonstrate to me that in
11 fact there is something to this and not just have
12 somebody show up and say I was told by (B) that (A) said
13 this. If that's what you got, that would not be a good
14 way to start because it's not going to lead anything
15 beyond that witness.

16 MR. DANZI: Judge, then may that witness please
17 be the attorney for Emhart, Mr. Comelli (ph.), who we
18 spoke to, who wrote -- who confirmed to us after
19 consulting with his client, the representations made to
20 me by Mr. Hyre?

21 THE COURT: You choose the witness.

22 MR. DANZI: Fine. That's what I wanted to
23 know.

24 THE COURT: I am not going to choose the
25 witness for you. You choose what you believe is the best

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1 witness who is going to demonstrate firsthand not through
2 hearsay, I spoke to so and so, but who is going to
3 demonstrate in a very, you know, convincing manner that
4 interference has occurred.

5 MR. DANZI: Yes, Judge.

6 THE COURT: That's as much as I can guide you.

7 MR. DANZI: Thank you, your Honor.

8 MR. BORNSTEIN: And, your Honor?

9 THE COURT: But you need to tell counsel for
10 the defense who I am sure about to raise this, who is
11 coming and make arrangements for Hyre to be available for
12 a deposition in any event.

13 MR. DANZI: Yes.

14 THE COURT: So if you are -- if we feel there's
15 going to be a deposition problem for Hyre, I'll so order
16 the deposition subpoena. Okay? It's amazing what my pen
17 can do. I can sign lots of subpoenas.

18 MR. BORNSTEIN: Your Honor?

19 MR. DANZI: Thank you, Judge.

20 THE COURT: Happy to do it. All right. What
21 else do we have?

22 MR. BORNSTEIN: Well, your Honor, if we're
23 going to have a hearing on this issue --

24 THE COURT: Yes.

25 MR. BORNSTEIN: -- I would request that I have

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1 some advance knowledge of what is the testimony will be,
2 so that I have the opportunity to (inaudible).

3 THE COURT: Well we've got to identify the
4 witness. That's why I said you've got to give counsel
5 notice of who the witness is and give a proffer to
6 counsel. That's fine.

7 MR. DANZI: Yes, your Honor.

8 THE COURT: That's more than fair.

9 MR. DANZI: We'll do that.

10 THE COURT: All right. Let me give you a date.

11 MR. BORNSTEIN: When we say a proffer, are we
12 talking about in the form of an affidavit or just a
13 statement by counsel of what it is this person will
14 testify to?

15 THE COURT: A proffer can be an oral statement,
16 just an oral statement is fine.

17 MR. DANZI: Thank you, Judge.

18 THE COURT: October 12 at 10:30.

19 MR. DANZI: Yes, your Honor.

20 MR. BORNSTEIN: Your Honor?

21 THE COURT: Yes.

22 MR. BORNSTEIN: I apologize but I have a trial
23 currently scheduled --

24 THE COURT: Oh, that's okay. I'm sorry. Yes,
25 I should have asked if it was okay before I ordered it.

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1 Go ahead.

2 MR. BORNSTEIN: I have a trial currently
3 scheduled to begin on October 4.

4 THE COURT: Okay.

5 MR. BORNSTEIN: Which is --

6 THE COURT: How long before you're available?

7 MR. BORNSTEIN: I would request that we do it
8 at the end of October if it's possible with the Court's
9 schedule.

10 THE COURT: All right.

11 MR. DANZI: Your Honor, I have a trial October
12 21, jury selection -- so if you want to do it before
13 that, I would have to be (inaudible).

14 THE COURT: Well I don't think you're available
15 before that.

16 MR. BORNSTEIN: I can do it after your trial.

17 THE COURT: Okay. When is that? Now we're into
18 November.

19 MR. DANZI: Yes, your Honor.

20 THE COURT: Okay.

21 MR. DANZI: Judge, if I'm not available, Mr.
22 Lustberg will take that trial. So let's not delay it to
23 the middle of November. We would be happy to take that
24 October date.

25 THE COURT: Okay.

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1 MR. DANZI: State court's rather unpredictable.

2 So, maybe my case won't go (inaudible).

3 THE COURT: All right. October 26?

4 MR. BORNSTEIN: If I may look at my calendar,
5 your Honor.

6 THE COURT: Sure. Go ahead.

7 MR. BORNSTEIN: Thank you.

8 MR. DANZI: Judge?

9 THE COURT: Yes.

10 MR. DANZI: I'm sorry. Is there a record made
11 of this proceeding?

12 THE COURT: Yes.

13 MR. DANZI: Who do I (inaudible).

14 THE COURT: Mr. Imrie.

15 MR. DANZI: Thank you very much.

16 MR. BORNSTEIN: Your Honor, I have a hearing
17 scheduled in New York State Court for the morning of the
18 26th but if that's the date that works best for the
19 Court, I'll have somebody else cover it.

20 THE COURT: Well let's see. We could do the
21 29th also.

22 MR. BORNSTEIN: The 29th would certainly be
23 preferable for me.

24 THE COURT: All right. The 29th at 10:30.

25 MR. DANZI: Consider it done, Judge.

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1 THE COURT: Okay. Now --

2 MR. DANZI: Judge, you said 9:30?

3 THE COURT: 10:30. All right. So what else do
4 we have to resolve?

5 MR. DANZI: That's it as far as I can see,
6 Judge, (inaudible).

7 THE COURT: Okay. Are we done?

8 MR. BORNSTEIN: I have nothing else, your
9 Honor.

10 THE COURT: Okay. Now there's some other items
11 on that motion to compel but if you tell me we're done,
12 we're done. We're done?

13 MR. BORNSTEIN: The only other thing I have on
14 my agenda, your Honor, is the Court said at the beginning
15 of the hearing there would be an adjustment to the
16 schedule.

17 THE COURT: Yes. Oh, right. I'm going to give
18 you six more months for discovery. So I'm going to send
19 you a proposed schedule. You tell me if it works. If
20 you want to make a slight adjustment to it, then fine.
21 But you don't have to come in to do that. Just jointly
22 agree to how you want to adjust it, if it's -- if an
23 adjustment is needed. But don't adjust the six months.
24 That's going to be locked in stone. You may need a
25 little more time for summary motion practice or the date

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1 for a final conference, you might want to alter but six
2 months is it. Okay?

3 (No response.)

4 THE COURT: All right, folks. Thank you.

5 MR. DANZI: Thank you, your Honor.

6 MR. BORNSTEIN: Thank you very much.

7 (Matter concluded)

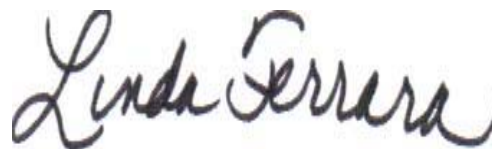
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CERTIFICATION

I, Linda Ferrara, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: November 15, 2010

A handwritten signature in dark ink that reads "Linda Ferrara". The script is cursive and fluid, with the first name "Linda" and last name "Ferrara" clearly distinguishable.

Signature of Approved Transcriber